IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 510

AMERICAN TRUCKING ASSOCIATIONS, INC. AND NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., *Appellants*

v.

UNITED STATES OF AMERICA ET AL., *Appellees*

No. 511

THE PENNSYLVANIA RAILROAD COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA ET AL., *Appellees*

On Appeal From The United States District Court For The Eastern District of Pennsylvania

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PETITION FOR REHEARING

In this case the Interstate Commerce Commission construed Section 202(a) of Part II of the Interstate Commerce Act, 49 U.S.C. § 303(a), which defines its basic regulatory jurisdiction over motor transportation in the following terms:

> "The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission."

The Commission held, four members dissenting, that Section 202(a) gives it no economic regulatory authority over for-hire motor transportation within a single state of property in the course of continuous movement from one state to another if the movement across state lines is performed by a private, as distinguished from a for-hire, carrier. The District Court for the Eastern District of Pennsylvania affirmed *per curiam*.

The Commission now has second thoughts. In response to Appellants' Jurisdictional Statements to this Court it joined the United States in a Memorandum in which they point to shortcomings in the rationale of the Commission's decision, conclude that they cannot say that the question "is so insubstantial as not to warrant plenary hearing," and therefore "do not oppose the noting of probable jurisdiction." The Memorandum then goes on to say "that the record might be thought to provide an insufficient basis for determining whether there is any significant practical impact to the decision," in view of the absence therefrom of "facts indicating the actual or potential scope of" the transportation at issue.

Were the Commission's decision before this Court on a petition for a writ of certiorari, the suggested inadequacy of the factual record might well justify the denial of the writ, the effect of which would be to leave the admittedly substantial question of law open for decision on an adequate record. But the Commission's decision is before this Court on appeal from the District Court's judgment affirming it. This Court's affirmance of that judgment, unlike the refusal to review it, definitely and finally commands the construction of the statute the Commission adopted. We submit that a substantial question of law going to the reach of the basic jurisdiction over motor carriage granted by the Congress to the Interstate Commerce

Commission should not be summarily resolved by this Court.

Appellants here are the regulated motor and rail carriers. As their jurisdictional statements say, the Commission's decision will adversely affect them. However, if this Court is of the view that it should not resolve the substantial question of law presented on the record made before the Commission, we submit that the appropriate action is to vacate the judgment of the District Court with directions to remand the case to the Commission for further proceedings in which an adequate record can be made. Appellants so pray.*

Respectfully,

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March 23, 1966

* The Memorandum also refers to "a procedural problem", i.e., the "justiciability of the dispute". If the Commission's order is not judicially reviewable there is no case or controversy and the District Court's decision on the merits and this Court's affirmance of it are advisory opinions.

CERTIFICATE OF COUNSEL

I, the undersigned counsel in the above cause, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and that this Petition is restricted to grounds not previously presented in accordance with Paragraph 2 of Rule 58 of the Court.

BRYCE REA, JR.